

1500238 (Migration) [2016] AATA 3704 (31 March 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Miss Savy Bun
VISA APPLICANT:	Mr Phirith Noun
CASE NUMBER:	1500238
DIBP REFERENCE(S):	OSF2013/089271
MEMBER:	Helena Claringbold
DATE:	31 March 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • cl.300.216 of Schedule 2 to the Regulations

Statement made on 31 March 2016 at 11:26am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant Mr Phirith Noun, the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. Mr Noun applied for the visa on 20 September 2013 on the basis of his relationship with Ms Savy Bun.
3. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on 18 September 2014 on the basis that the visa applicant did not satisfy cl.300.216 of Schedule 2 to the Regulations because the delegate was not satisfied that the parties intend to be in a genuine and continuing relationship and genuinely intended to live together as spouses.
5. Ms Bun requested review of the delegate's decision. She appeared before the Tribunal on 21 March 2016 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Phirith Noun and Ms Vathana San. The Tribunal hearing was conducted with the assistance of an interpreter in the Khmer and English languages.
6. The review applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The Tribunal has taken into consideration all the evidence in the Departmental case file OSF2013/089271, folios numbered 1-237 and the Tribunal's case file 1500238, folios numbered 1-91 and the oral evidence given at the Tribunal hearing.

9. **ISSUE**

10. The issue in the present case is whether the parties genuinely intend to live together as spouses.

11. ***What is the background of this case based on the evidence before the Tribunal?***

12. Mr Noun was born on 15 May 1986. He is a Cambodian national. His parents, Mr Bora Noun and Ms Sam Inn Men, his sister, Ms Phirum Noun and her husband and two children and his sister, Puthearth Noun and her husband and son reside in Cambodia. He has a brother, Phirum Noun who lives in Australia with his wife and daughter. He travelled to Sydney in 2011 and 2013.

13. Ms Bun was born on 15 October 1983. She is an Australian citizen who was born in Cambodia. Her parents reside in Cambodia. She migrated to Australia with her grandmother, Sin who reared her. They were sponsored by her uncle Heng Bun who is married to Sokhom Kong. They have three children, Leang Bun and Charlie Bun who, at the time of application, resided with them and Kim Heang Bun who is married and lives in Coffs Harbour.
14. On 2 July 2011, the parties met. On 14 February 2012, they committed to a shared life together. On 23 March 2013, the parties became engaged in Cambodia. The parties planned to marry on 30 August 2014.

15. Do the parties genuinely intend to live together?

16. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). Whilst it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.

17. The Tribunal Hearing

18. The parties provided evidence about their meeting and development of their relationship. They have known each other since 2011 and their relationship has continued to develop through Mr Noun's visits to Australia and Ms Bun's visits to Cambodia. When Ms Bun is in Cambodia she resides with Mr Noun's family. In 2013 when the parties became engaged they hosted a party and family and friends attended. Mr Noun paid for the celebration. Photographic evidence depicts the parties together and with family members at this event. Ms Bun visited Mr Noun in 2014 and in 2015 she travelled again to Cambodia. The parties shared the cost of last the trip with Ms Bun paying for flights and Mr Noun paying for sightseeing and other daily expenses. When the parties are not together they remain in contact by telephone and Facebook. Initially the parties will live with Ms Bun's family. Mr Noun will take English classes and look for employment. They plan to work and save to purchase a property and have talked about starting a business together.
19. The Tribunal put new information to Ms Bun and told her that it would be the reason or part of the reasons for affirming the decision. Ms Bun was invited to comment on or respond to the information and advised she could seek additional time to do so. Ms Bun responded at the Tribunal hearing.
20. With regard to Mr Noun's evidence that the parties had a joint bank account and its sole purpose is for saving, that he had sent \$1,000 to deposit into the account, but he couldn't remember when, however he thought it was sent about three to four months ago. In addition he stated that Ms Bun sends Ms Noun money to purchase items for her and he sends them back to Australia. The Tribunal put this information to Ms Bun as it was inconsistent to her evidence that the parties have a joint account but she doesn't use the account.

21. Ms Bun responded that, due to the nature of her work, she sometimes does not have time to do the banking and sometimes a friend will do the banking for her. She continued that there is \$3,500 in the parties' joint account and Mr Noun sent \$1,000 about two to three months ago, but she only uses the account once in a while. In addition the money she sent to Mr Noun was for him to use or just keep and that the reason the parties send each other money is that they care for each other.
22. The Tribunal provided Ms Bun additional time to submit information about the parties' joint account.
23. On 24 March 2016, Ms Bun's migration agent provided the following information:
 - Deposits into the parties' joint account were made by Ms Bun from her wages. In addition Ms Bun's friend Vathana San has provided Ms Bun with a few loans.
 - The migration agent is advised that Mr Noun has not sent the US\$1,000 as was claimed in the hearing. Mr Noun became embarrassed and wanted to make it appear that he contributed to the account and he made a mistake of saying that he sent this amount without realising the consequences.
 - Also provided are bank statements for the parties' joint account from 28 February 2013 until August 2013 with a balance of \$50.18 credit and from August 2015 until February 2016 with a balance of \$2,254.42 credit.
24. The Tribunal is satisfied that the parties told untruths to the Tribunal to present a view of their financial relationship, which does not exist. Mr Noun told the Tribunal that he had deposited \$US1,000 into the parties' joint account and Ms Bun in her evidence to the Tribunal confirmed this statement. The Tribunal does not accept that Mr Noun was embarrassed rather it finds that the parties lied about their financial situation and their joint account and this is substantiated by the copies of the joint account bank statements and Mr Noun's disclosure, after the Tribunal hearing, that he had misrepresented the true situation.
25. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the Tribunal is satisfied that the parties' demonstrated knowledge of each other is broadly consistent with a couple who have known each other since June 2011, committed to a shared life in February 2012 and became engaged in March 2013 and that they intend to live together as spouses.
26. Although the parties gave reasonably consistent evidence about their relationship when the Tribunal examined the parties' knowledge of their financial affairs, the parties' evidence about their joint bank account was inconsistent. The inconsistent evidence partnered with vague responses about the deposits into the account, transfers of monies to and from the parties and the use of the account led the Tribunal to question the parties' credibility. The Tribunal has balanced the parties' evidence about their finances, which is not commended, against the longevity of their relationship and the evidence they provided about the development of their relationship and their expectation for their future together. Alongside this, the Tribunal considered the third party statements and pictorial evidence about the parties' relationship and is satisfied that the parties have a genuine intention to live together as spouses. Accordingly, at the time of application and at the time of this decision the Tribunal is satisfied that the parties did have a genuine intention to live together as spouses, and therefore cl.300.216 is met.
27. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

28. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:

- cl.300.216 of Schedule 2 to the Regulations

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Helena Claringbold
Member

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